In the United States Court of Appeals for the Ninth Circuit

No. 16383

MORRISON-KNUDSEN COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 16401

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON CROSS-PETITIONS TO ENFORCE, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

These cases are before the Court upon separate petitions to review and set aside an order (R. 85–92)[1] issued by the National Labor Relations Board on January 29, 1959, against Morrison-Knudsen Com-

[1] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

pany, Inc., herein called the Company, and International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL–CIO, herein called the Union or Local 341. In its answers to these petitions, the Board has sought enforcement of its order. The Board's order was issued in a proceeding under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), herein called the Act.[2] The Board's decision and order are reported at 122 NLRB No. 136. By order of this Court dated April 15, 1959, the cases were consolidated before this Court for purposes of brief and argument. This Court has jurisdiction under Section 10(f) of the Act, the unfair labor practices having been committed in Alaska, within this judicial circuit.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that the Company conditioned the hiring of five job applicants upon their joining the Union and obtaining clearance from it. The Board also found that the Company and the Union maintained and participated in an arrangement and practice which required job applicants to obtain from the Union, as a condition of employment, dispatch slips which were issued only after such job applicants had applied for union membership. The Board found that the Company's conduct violated Section 8(a) (3) and (1) of the Act, and

[2] Relevant portions of the Act are printed as an appendix to this brief.

that the Union's conduct violated Section 8(b) (1)(A) and (2). The subsidiary facts upon which the Board based its findings are summarized below.

A. Hiring at the Company's Anchorage office for the White Alice project

During the period here relevant, the Company was engaged on a construction project in Alaska, for the Western Electric Company, referred to in the record as the "White Alice" project or "contract 1787 on C.P.F.F." (cost plus fixed fee) (R. 27–28; 127–128).[3] All new hires for this project were cleared through the Company's personnel office in Anchorage, Alaska (R. 331–332). The Anchorage personnel manager on this project during the period here relevant was Raoul Wargny (R. 58; 129–130). When he assumed this position in March 1956, he discovered that the Company had a general practice of requiring union clearance as a condition of hire (R. 120–121, 162). Both Wargny and District Manager Erickson, who was "complete boss" of all the Company's construction work in Alaska (R. 322), "assumed" that an employee had to join the Union before he could get a dispatch slip (R. 59; 155, 352). Wargny never hired non-union employees (R. 161). According to Wargny's testimony, credited by the Trial Examiner and the Board (R. 58–59), the Company's hiring practice was as follows:

The site superintendent "would radio" that he needed men, giving the job classifications, the number, the date, and the location (R. 58; 121, 157–158).

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[3] This was part of a contract referred to in the record as the "Big Mountain" contract (R. 127–128).

If the request did not name any particular individuals whom the superintendent wanted, the Company's personnel office "would call up the unions" and relay the information given by the site superintendent (R. 121). The unions then selected the persons to be referred (R. 145). If the site superintendent requested a particular individual by name, the personnel office first checked the Company files to determine whether his previous work record was satisfactory and whether he was a union member; the latter information was available on the employee's application for work (R. 29; 140–141, 144–145, 398). If the person requested met these qualifications, the personnel office telephoned him and told him that he would have to go to the appropriate union to get a dispatch slip (R. 145–147).[4] The Company's personnel office also "would call up * * * the concerned union" and ask "if the man was in good standing and he was eligible to be dispatched for hiring" (R. 58; 122–123). In either situation, after calling the union, the personnel office would put a notation to that effect on the radio message slip containing the request for men (R. 163–164).

The unions would ordinarily issue a dispatch slip to any individual requested by name if he was "available and in good standing with the unions" (R. 58, 82 n. 2; 145).[5] However, the unions "allowed" the Company

[4] District Manager Erickson testified that the Company relied upon the union to locate such individuals because "the union has generally got a better knowledge of where to locate that employee in a hurry than we do" (R. 325–326).

[5] Notwithstanding Company Personnel Manager Wargny's phrase "good standing with the unions" (R. 145), the Union

to fill only half of its vacancies with individuals requested by it; the unions insisted on unilaterally filling at least half of such vacancies (R. 58; 123). If a union failed to dispatch a requested individual, the Company "would ask for a substitute" (R. 58; 122). If the union gave him a dispatch slip, the Company personnel office "would process him and send him out to the site" (*id.*). The Company insisted on seeing an individual's dispatch slip before hiring him, whether or not he had been requested by name (R. 59; 146, 147). The Company also gave him an employment application form inquiring his union affiliation (R. 29; 140–141, 398). No employee ever reported for work without a dispatch slip (R. 146).

The Company followed the foregoing procedure in obtaining personnel within the work jurisdiction of Local 341—i.e., laborers—as well as other personnel within the jurisdiction of other unions (R. 58; 121–124, 133–135, 159). On several occasions Local 341 refused to issue clearances to individuals whom the Company had requested by name (R. 159–160). Under such circumstances, the Company "would radio the site superintendent and say the man was not * * * available because he wasn't a member of the union or wasn't cleared through the union" (R. 134). Local

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insists (Un. br., pp. 19–20) that he meant "good standing with the Company." However, the testimony on which the Union relies was given in response to the questions, "How do *you* know whether or not they're in good standing * * *? * * * What do *you* mean by good standing?" (emphasis supplied). Wargny answered the latter question, in part, that he meant a man who was eligible for rehire so far as the Company was concerned (R. 146).

341 refused to dispatch at least one individual requested by the Company because he "was not a member of the union and they had so many men on the bench that had priority that they didn't want to accept any more" (R. 59; 159–160).

The record also shows how the foregoing arrangement operated with respect to certain applicants, who, Personnel Manager Wargny testified, "were processed in the regular way" (R. 58–59; 125). To these individual cases we now turn.

B. The hiring arrangement in practice; specific examples

In the spring of 1956, the University of Washington Athletic Department requested the Company to give summer jobs in Alaska to some students or prospective students who were expected to take part in college athletics during the following school year (R. 29; 330, 193, 198–199, 209–210). District Manager Erickson advised both the Athletic Department and District Office Manager Haugen that the Company would hire a certain number of such students (R. 29–30; 330, 382). Haugen in turn notified Harold Groothias, Local 341's business agent, "that these boys would be arriving soon" (R. 34–35; 384). He also telephoned Personnel Manager Wargny that "arrangements were made that [the students] could go down to the union to join the union, Local 341; and as soon as they come in to send them there to get their dispatch slips and come back to the office to be processed and sent out on sites" (R. 153–154, 130–132).

The Athletic Department told four students—Abolins, Crowe, Garnes, and Bleek—to report to District Manager Erickson for work (R. 29–30; 171).

However, when the four students reported to Erickson's office, on June 11, 1956, Erickson was not there (R. 30; 382–383). Accordingly, Erickson's secretary ushered them into the office of District Office Manager Haugen (R. 30; 383). Haugen told the students that he had "expected" them (R. 31, 34; 203). He did not ask them whether they wanted to join the Union, but said flatly that they "would have to join the union before [they] could work" (R. 31–32, 34; 213, 219).[6] Haugen told them that they would have to go through the union hall and then would be dispatched to a job site (R. 30, 34; 172). Haugen then, on his own initiative, telephoned Union Business Agent Groothias that the students were in Haugen's office (R. 31, 34; 385, 392, 172, 188). Groothias replied that he did not want the students to come down to the union hall and that he would like to see them on the Company's premises (R. 35; 385).

When Groothias arrived at the Company's offices, Haugen introduced the students to him (R. 35; 194, 385). Groothias then escorted them to a vacant company office and gave each of them a membership application (R. 35; 173–176, 400). Groothias told them that (R. 59–60; 176, 198, 203–204):

> * * * in order to work [they] would have to join the union and he said that generally it is accepted practice for the individual, when he

[6] This finding is based on the testimony of Garnes, who was credited by the Trial Examiner and the Board. Haugen denied making this statement, with the explanation that such a remark would violate the Act and that if he had made it his superior "would have thrown [him] out of the office bodily. It just wasn't ever mentioned by anyone" (R. 387).

> desires to join the union, to pay the $50 initiation fee at the time he joins. However, he said he was making a special exception in [their] case and he would let [them] go out there owing him money. But he put it very clearly * * * that if [they] did not send the money in within the first or second pay check, he would come out and get [them].

Groothias filled out the application blanks and the students signed them (R. 35; 176, 203). Groothias then gave the students a ride to the Company's employment office, which was some distance away (R. 35; 178, 204, 215).

When the students arrived at the Company's employment office, the Company provided them with job application blanks which included an inquiry as to their union membership (R. 29; 140–141, 215, 398). The students then talked with Personnel Manager Wargny, who told them that when they had obtained their dispatch slips they would be processed for work (R. 35; 154, 215–216). One of Wargny's assistants drove them over to the union hall, where they got their dispatch slips, in duplicate, from Groothias (R. 35; 179, 205, 216). The students then returned to the Company's office, turned in one copy of their dispatch slips to the Company, and received their travel orders (R. 125, 132, 181, 207, 216).

When Employee Abolins arrived at the job site, Job Steward Alukas told him to pay his dues with his first pay check (R. 183). Abolins replied that he had a previous commitment that his first check would go for his fare to Alaska (R. 59–60; 183). Steward

Alukas, who became a company foreman a few months later, then said that Abolins' "first commitment was, of course, the union or they would put [him] out of a job" (R. 59–60; 183–184).[7] Abolins then agreed to pay the Union with his second pay check (R. 59–60; 184). When he received this check, he paid the Union his initiation fee and one year's dues in advance, amounting to $98 (R. 59–60; 177, 401). Other employees likewise paid their fees and dues soon after starting to work (R. 207–208, 217–218, 403).

The day after these employees left for the job site, another athlete, Wyman, came to the Company's office and spoke to either the Company's assistant personnel manager or the Company's assistant project manager (R. 33; 307–309). The Company representative told Wyman that he would be leaving for a job site on the following day and that he would "need" to get a dispatch slip from the Union before he left (R. 33, 60; 309). The Company representative also telephoned the Union that Wyman was going out to Alaska to work and "need[ed] a dispatch slip" (R. 60; 316–317).

Wyman thereupon went to Business Agent Groothias and asked him for a dispatch slip (R. 33–34, 60; 316, 318). Groothias replied, "Well, we will get the dispatch slip for you as soon as we fill out the application" (R. 60; 318). Groothias then gave Wyman a membership application, which Wyman signed

[7] Alukas had made similar statements to employees during the 1955 construction season (R. 297–298, 303).

and returned to Groothias (R. 34; 310–311, 400, 175–176). Wyman told Groothias that he could not afford to pay the initiation fee or the year's dues at that time (R. 312). Groothias replied that when he got on the job he could give his dispatch slip and his fees to the union representative out there (R. 34; 312). When Wyman arrived at the job site, he complied (R. 312).

II. The Board's conclusions

The Board adopted the Trial Examiner's findings, based on the foregoing evidence and to which the Company did not except, that the Company violated Section 8(a) (3) and (1) of the Act by conditioning the employment of Abolins, Crowe, Garnes, Bleek, and Wyman, upon their joining the Union and obtaining clearance from it (R. 81, 37–38). The Board also found that the Company and the Union violated Section 8(a) (3) and (1) and Section 8(b) (2) and (1)(A), respectively, by maintaining, with respect to hirings at Anchorage for the Company's White Alice project, an arrangement and practice of conditioning employment on membership in, and clearance by, the Union (R. 81–82).[8]

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[8] As set forth in detail on pp. 23–26, *infra*, at the conclusion of the General Counsel's case in chief the Trial Examiner granted the Union's motion to dismiss the complaint as to it (R. 320–321). The General Counsel filed exceptions to the portion of the first Intermediate Report reflecting this action (R. 27, 44). Thereafter the Board issued a Decision and Order Remanding Case in which it found that the General Counsel had made out a *prima facie* case with respect to the existence of an unlawful hiring arrangement, and remanded the case to the Trial Examiner in order to give the Union an opportunity to present its case (R. 49–52). However, the

III. The Board's order

The Board's order (R. 85–92) requires the Company to cease and desist from giving effect to any arrangement with the Union or any other labor organization whereby applicants for employment must join such labor organization and obtain clearance or dispatch slips from it as a condition of employment, except in accordance with Section 8(a)(3) of the Act. The order similarly requires the Union to cease and desist from giving effect to any such arrangement with the Company or any other employer, and from causing or attempting to cause the Company or any other employer unlawfully to discriminate against employees. Both the Company and the Union are required to cease and desist from in any other manner coercing employees in the exercise of their statutory rights. Affirmatively, the Company and the Union are required jointly and severally to refund, to all present and former Company employees hired at Anchorage for the White Alice contract, all initiation fees, dues, and other moneys paid to the Union as a condition of membership,[9] and to post appropriate notices.

Union advised the Trial Examiner that it did not wish to present any evidence (R. 53). The Trial Examiner found in his Supplemental Intermediate Report that the Union and the Company were parties to an unlawful hiring arrangement and the Board in substance affirmed the Trial Examiner's finding (R. 62, 81–82).

[9] Liability for reimbursement begins 6 months prior to the date of the filing and service of the charges, and the period between the issuance of the Intermediate Report and the Supplemental Intermediate Report is excluded because of the Trial

SUMMARY OF ARGUMENT

1. The record as a whole clearly supports the Board's finding that the Company and the Union were parties to an arrangement and practice which made union membership and clearance a condition of employment. Petitioners themselves do not deny that if they were parties to such an arrangement the Company violated Section 8(a) (3) and (1) of the Act and the Union violated Section 8(b) (2) and (1)(A).

The existence of such an arrangement is the most obvious explanation for the Company's requirement that the students join the Union and obtain dispatch slips before they were put on the payroll, even though they had come to Alaska in order to work for the Company. That this is the true explanation is confirmed by the fact that the Company always conditioned employment upon union membership and clearance, and the undenied testimony that union representatives told employees that the Union had put them on the job and that the Company would discharge them if they did not join the Union and pay their fees and dues. Furthermore, it appears that every laborer hired through the Anchorage office for the White Alice project was a union member, or applicant for membership, with union clearance.

Finally, the record contains no real evidence, even of a conclusionary nature, which militates against the Board's finding of an unlawful agreement. In fact, a number of petitioners' contentions and the

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Examiner's initial recommendation that the complaint be dismissed insofar as it alleged an illegal agreement.

inferences flowing therefrom in themselves confirm the Board's finding.

2. The Board's order is a proper exercise of its broad discretion in selecting the appropriate remedy for unfair labor practices. A broad cease-and-desist order is warranted by the serious invasion of employees' statutory rights which inheres in petitioners' prolonged closed-shop practices, by the fact that such practices are called for by the Union's policy, and by the fact that the Company has repeatedly participated in unlawful employment practices with respect to other unions and in other areas.

Moreover, the Board's reimbursement order, which requires petitioners to restore to the employees the dues and fees which they paid in order to work, is well adapted to the situation to be redressed, *i.e.*, petitioners' practice of making union membership a condition of employment. Petitioners appear to concede the propriety of such an order generally and, contrary to their contention, the fact that they committed the unfair labor practices while performing defense work does not render the order improper. Moreover, the courts have uniformly approved such orders where, as here, an illegal union-security arrangement has coerced employees into paying for their jobs.

ARGUMENT

A substantial portion of petitioners' briefs proceeds on the assumption that the Board based its unfair labor practice findings and order on the theory set out in *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 119 NLRB 883, remanded, 44 LRRM

2802 (C.A. 9, No. 15966, August 28, 1959). Accordingly, we should like to make it clear at the outset that the Board's conclusions and order are in no way based on the *Mountain Pacific* theory. The Board held in that case that an arrangement under which an employer agrees to obtain all of his employees through a union may be invalid, even though it does not provide in terms that preference will be given to union members. In the instant case, the Board found that the Company and the Union violated the Act by maintaining an arrangement under which the Company, in fact, required all of its laborers to obtain union dispatch slips as a condition of hire, and the Union issued dispatch slips only to members or applicants for membership. As is shown in the cases cited in fn. 10, p. 15, *infra,* both this Court and other Courts of Appeals have uniformly held that such a closed-shop arrangement violates the Act, as, indeed, petitioners concede by implication (Co. br. p. 15, Un. br. p. 25–26). For these reasons, we respectfully request this Court to disregard all contentions in petitioners' briefs which are directed at the Board's *Mountain Pacific* theory or arguments based on the assumption that that theory is an issue in the case at bar.

I. Substantial evidence on the record considered as a whole supports the Board's finding that the Company and the Union, in violation of Section 8(a) (3) and (1) and Section 8(b) (2) and (1)(A), respectively, maintained an arrangement and practice of conditioning employment on membership in, and clearance by, the Union

As noted above, the Board found that the Company and the Union maintained an arrangement and practice under which all laborers hired through the Com-

pany's Anchorage personnel office were required to be union members or to apply for membership, and to obtain clearance from the Union, as a condition of obtaining employment on the Company's White Alice project. It is well settled that by maintaining such an arrangement an employer violates Section 8(a) (3) and (1) of the Act and a union violates Section 8(b) (2) and (1)(A).[10] The record as a whole amply supports the Board's finding that the Company and the Union were parties to such an unlawful arrangement.

A. The evidence establishes the existence of such an arrangement

As set forth on pp. 6–10, *supra,* the Company advised the University of Washington Athletic Department that it would give summer jobs in Alaska to a number of college athletes. The athletes travelled from the State of Washington to Alaska, one of them paying his fare out of borrowed money, in reliance upon the Company's statement to the Athletic Department (R. 170, 183, 200, 212, 307). Nevertheless, when they arrived in Anchorage, the Company's district office manager told four of them that they would have to join the Union, and go through

[10] *N.L.R.B.* v. *Daboll*, 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U.S. 917; *N.L.R.B.* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, A.F.L.*, 202 F. 2d 516, 518 (C.A. 9); *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 513–516 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B.* v. *Philadelphia Iron Works*, 211 F. 2d 937, 943 (C.A. 3); *N.L.R.B.* v. *F. H. McGraw and Company*, 206 F. 2d 635, 638, 639 (C.A. 6); *N.L.R.B.* v. *United Brotherhood of Carpenters and Joiners of America, Local No. 517, AFL*, 230 F. 2d 256, 257, 259 (C.A. 1); *N.L.R.B.* v. *Local 420, United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada, AFL*, 239 F. 2d 327, 330 (C.A. 3).

the union hall, before they could work in Alaska (R. 30–31, 34; 213, 219, 172). The Company's assistant personnel manager or assistant project manager told the fifth student that he would "need" to get a dispatch slip from the Union before leaving for the job site (R. 33, 60; 309, 316–317), and as the Company knew, the Union issued dispatch slips only to members or applicants for membership (R. 61; 318, 155, 352, 160, 243). Particularly in view of the Company's moral obligation to hire these students after they had come to Alaska, the most obvious explanation for the Company's requirement that they join the Union and obtain union dispatch slips before they could be hired is, as the Board found, that the Company and the Union were parties to an arrangement which imposed this requirement.[11]

Moreover, the record shows that the Company treated all job applicants as it did the students, regardless of whether or not the Company affirmatively wanted to hire them. Personnel Manager Wargny testified that his office always required union membership and union dispatch slips as a condition of hire, and that the students "were processed in the regular

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[11] The Company at no time excepted to the Board's finding that it violated Section 8(a) (3) and (1) of the Act by requiring these students to obtain union membership and clearance as a condition of hire. In fact, the Company admitted in its brief to the Board that "the record contained sufficient evidence to support [the] finding." Accordingly, the Company concedes (Co. br., p. 12) that it may not challenge this finding before this Court. *N.L.R.B.* v. *International Association of Machinists, Lodge 942, AFL–CIO*, 263 F. 2d 796, 798–799 (C.A. 9), and cases cited therein.

way'' (see pp. 3–6, *supra*).[12] Wargny's assistant, who had been trained in the "company policy'' by Wargny's predecessor as personnel manager, testified "* * * we always routed our people through the [union] halls with dispatch slips'' before sending them to the job (R. 223, 233). He further testified that the Company would require an employee to make arrangements to obtain a dispatch slip from the Union even when the Company knew that the employee was delinquent in his dues: "What their arrangements were with the Union, I don't know, I didn't care, except that it was our practice to obtain these men with dispatches'' (R. 226).[13]

Furthermore, the record shows that both union and company representatives believed that the Company owed the Union an obligation to continue its unlawful employment policy. Thus, it is undenied that Business Agent Groothias told some of the students that "in order to work, [they] would have to join the union,"

[12] The basis for the Company's contention (Co. br., pp. 12–13) that the students were treated differently from other applicants itself strongly suggests the existence of a Company-Union hiring arrangement. The Company asserts that it encouraged the students to join the Union "because of the substantial preference in employment they were receiving over the regular source of man power" and because the Company "wanted to avoid friction over the hiring of the students." The Company's expectation that such friction would develop shows that it was conscious that the Union and its members thought that the Company owed them employment preference.

[13] Likewise, Office Manager Haugen, who ran the Company district office which handled the Company's Alaska projects other than the White Alice project, testified that "for some time" the Company had had a "practice" of instructing job applicants to "check through" the appropriate union (R. 384).

and that if they did not pay their fees and dues he "would come out and get" them (R. 59–60; 176). He told another student, "* * * we are putting you people out on the job" (R. 318). The Union's steward told one of the students that "if it hadn't been for [the Union he] wouldn't be out there" and that the Company would discharge him if he did not pay his dues, even though the Company's written contract with the Union did not contain a union-security clause (R. 59–60; 183–184). In addition, Company Personnel Manager Wargny testified that the Company was "allowed" to request by name only one-half of all the employees that it hired (R. 58; 123), and District Manager Erickson testified that a union dispatch slip meant that the Company was "supposed to hire" its owner (R. 326). The close coordination between the Company's and the Union's hiring machinery is demonstrated by the events which occurred before the students began to work for the Company. As set forth in detail on pp. 7–8, *supra*, the Company and the Union transported these students back and forth between their respective offices to enable both parties to perform their respective parts of the hiring process. The effect of petitioners' joint hiring practice was that, so far as the record shows, every single laborer hired through the Anchorage office for the White Alice project was a union member, or applicant for membership, with union clearance.[14] The record as a whole, and particu-

[14] The evidence relied on by the Union in support of its allegations to the contrary (Un. br., pp. 17, 21, 27) merely shows that some employees who were not hired through the Anchorage office, but were hired at the job sites, were nonmembers or had no union dispatch slips. This, of course, in no way reflects on

larly the evidence summarized above, fully warranted the Board's finding that both the Union and the Company participated in an unlawful hiring arrangement and practice requiring union membership and dispatch as a condition of hire. See *N.L.R.B.* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, AFL,* 202 F. 2d 516, 517, 518 (C.A. 9); *N.L.R.B.* v. *Local 369, International Hod Carriers, Building and Common Laborers' Union of America, AFL,* 240 F. 2d 539, 543 (C.A. 3); *N.L.R.B.* v. *United Brotherhood of Carpenters and Joiners of America, Local No. 517, AFL,* 230 F. 2d 256, 258–259 (C.A. 1); *N.L.R.B.* v. *Local 803, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL,* 218 F. 2d 299, 301–302 (C.A. 3).[15]

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the Board's finding with respect to hires through the Anchorage office. The difference in the Company's hiring practice at its Anchorage office and its hiring practice at the job sites may be attributable in part to the fact that the Union apparently maintained no hiring hall at the job sites (see R. 243), in part to the fact that most skilled employees had to be obtained through the Anchorage office (see Co. br., p. 3, and Un. br. p. 16), and in part to the fact that different Company representatives did the hiring at the job sites.

[15] This evidence of the Union's continued and active participation in the Company's hiring processes, and its insistence on obtaining the benefits to it arising therefrom, makes inapplicable here the cases relied upon in the Union's brief (*N.L.R.B.* v. *Thomas Rigging Co.*, 211 F. 2d 153, 157–158 (C.A. 9), employer's petition for certiorari denied, 348 U.S. 871; and *N.L.R.B.* v. *Brotherhood of Painters, Decorators and Paperhangers of America, Carpet, Linoleum Resilient Tile Layers Local Union No. 419*, 242 F. 2d 477, 479–480 (C.A. 10)). In both of these cases the courts found that existence of an employer-union hiring agreement could not be inferred solely from the union's passive acquiescence in the employer's unlawful hir-

B. There is no real evidence which militates against the Board's finding

Virtually all of the evidence summarized above is undisputed. Thus, the testimony by Personnel Manager Wargny and his assistant that the Company required dispatch slips as a condition of hire is corroborated by the experience of the students and stands undenied in the record. Indeed, the Company does not appear to contest before this Court the Board's finding that it followed this practice, which, of course, is sufficient to establish that the Company violated the Act. (*Morrison-Knudsen, Inc.* v. *N.L.R.B.*, 44 LRRM 2680, 2681 (C.A. 9, No. 16301, August 10, 1959). Furthermore, the Union's own argument assumes the propriety of such a finding. The Union takes the position that a dispatch slip in the possession of an applicant for employment serves as a "technique for enabling the Union * * * to know the names of persons being hired * * * by the Company" and as "evidence that the reporting applicant is the man whom the Union has referred in compliance with the Company's request" (Un. br. pp. 15–16). These contentions make sense only on the assumption that the Company would hire only applicants who had union dispatch slips. This is made clear by the testimony of District Manager Erickson that a union dispatch slip is "an indication that that is the man that the union sent to us. If he didn't have a dispatch slip, we would have fourteen guys on our porch every

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ing practice. Moreover, in *Thomas Rigging* none of the employees on the job was a union member or had union clearance. The instant case presents precisely the contrary situation.

morning saying they had been sent by the union and they are the ones we are supposed to take" (R. 326).[16]

Moreover, the Union has never denied, either through witnesses or otherwise, that it issued dispatch slips only to members or applicants for membership; in fact, it requires its members to do "all in [their] power to procure employment for [members] in preference to any and all nonunion men" (R. 400, 176). The Union merely challenges the sufficiency of the record testimony to support this finding. And if the record shows that the Union issued dispatch slips only to members, as we submit it does (R. 318, 155, 352, 160, 243), a violation of the statute is shown even apart from the testimony that union membership was required in terms as a condition of hire.[17]

Finally, the Union has never presented any witnesses to deny that it was in fact a party to the illegal agreement which the Board found. The Union's silence is particularly significant in view of the undenied evidence that Union Business Agent Groothias and Union Steward Alukas told the students that the Union was putting them on the job and that the Company would discharge them if they did not pay their fees and dues (R. 176, 183–184, 198,

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[16] Because the Company required all employees to obtain union approval as a condition of hire, petitioners' reliance on *Del E. Webb Construction Co.* v. *N.L.R.B.*, 196 F. 2d 841 (C.A. 8), is misplaced. As the Union concedes (Un. br. p. 26), the Court's conclusion in *Del E. Webb* was based on its finding that the employer was free to hire employees directly, without union approval.

[17] *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 513–514 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B.* v. *Waterfront Employers of Washington*, 211 F. 2d 946, 954 (C.A. 9).

203–204). Although this testimony virtually requires the inference that the Union's own business agent and steward believed that they had a closed-shop and clearance agreement with the Company, neither of them denied making the foregoing statements, even though Groothias, at least, was present during the hearing (R. 317–318). "Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges * * *." *Local 167* v. *United States,* 219 U.S. 293, 298.[18]

Notwithstanding this uncontradicted testimony in the record, petitioners contend that the testimony of Personnel Manager Wargny and District Manager Erickson compels a finding that no such arrangement

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[18] The Union contends that the testimony that Groothias made these statements is "contrary to plain common sense." The Union appears to base this attack on its allegation that the students were hired in the continental United States, before they went to Anchorage (Un. br., pp. 14–15). However, the Union's own conduct belies this contention. If the students had been hired in the continental United States, the Company's contract with the Union obligated the Company to reimburse them for the fare to Alaska (G.C. Exh. 5, Art. XIV, Sec. 1(a), omitted from printed record by Court order). However, when Employee Abolins, one of these students, explained to Union Steward Alukas that he would have to pay for his fare to Alaska before he could pay his initiation fee and dues, so far as the record shows, Alukas made no effort to induce the Company to pay Abolins' fare (R. 60; 183–184, 193). Instead, he told Abolins that his "first commitment was, of course, the union or they would put [him] out of a job" (R. 60; 183–184).

While the Company's obligation to reimburse employees for their fare to Alaska was limited to union members, it would not profit petitioners to advance this unlawful exception in an effort to explain away the evidence of its other discrimination against nonmembers.

existed. However, the Company's discriminatory policy antedated Wargny's employment in the Company's personnel office, and Wargny merely testified that he did not know whether there was an agreement to this effect (R. 162, 169, 222–223, 226). Moreover, Erickson's testimony as a whole tends to confirm the Board's finding, for Erickson testified that he "assumed" all employees with dispatch slips to be union members and that a union dispatch slip meant that the Company was "supposed to hire" its owner (R. 326, 352).[19] In any event, the Board was not obligated to credit these witnesses' testimony as interpreted by petitioners, particularly in view of the strong circumstantial evidence to the contrary. *N.L.R.B.* v. *Howell Chevrolet Co.,* 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482.

Indeed, the Union implicitly concedes that the record as a whole is sufficient to support the Board's unfair labor practice findings as to it. This is made clear by the reasons which the Union gives in support of its contention that the Trial Examiner properly granted its motion at the hearing to dismiss the com-

[19] Even if Erickson's testimony is taken as a denial that any closed-shop arrangement existed at the Anchorage personnel office, it would not be persuasive. Such an agreement may well have existed without his knowledge, for according to him two stages of authority intervened between him and the head of that office, and Erickson's own office was about three-quarters of a mile away (R. 352–353, 389). Three Company representatives personally participated in the hiring at the Anchorage office for the White Alice project—Wargny and Brady (whose testimony supports the Board's finding) and Bynum (R. 124). Bynum was not called as a witness, nor is his absence explained.

plaint as to it, at the conclusion of the General Counsel's case-in-chief, for lack of proof. The Union does not suggest, in this connection, that the Trial Examiner could have based his dismissal on any belief that the cold record failed to establish a *prima facie* case. Rather the Union insists that the alleged defect in the General Counsel's *prima facie* case (which the Union did not choose to answer by presenting testimony of its own) could have been attributable only to a belief by the Examiner, at that stage in the proceeding, that Wargny was an incredible witness. We have already established on pp. 15–23, *supra,* that Wargny's testimony is entitled to credence, particularly in view of the many respects in which it was corroborated by other witnesses. However, we should also like to point out that the Union completely misconceives both the basis for Trial Examiner's action in initially dismissing the complaint, and the scope of the Board's action in remanding the proceeding to the Trial Examiner.

In the first place, there is not the slightest suggestion in the record that the Trial Examiner's initial dismissal of the complaint with respect to the Union was in any way based upon doubt as to the credibility of Wargny's testimony. The Examiner stated at the hearing (R. 320–321):

> The only evidence which might tend to tie in the union with the allegations of the complaint is some testimony by Denton R. Moore * * * even if [his testimony] is so, and I am not passing upon that point because I don't think it is necessary, it is only an isolated incident

> and I see no reason to put the union to its proof or its defense. Therefore, each and every allegation of the complaint with respect to the union is hereby dismissed.

The prevailing rule, with respect to the issues presented on a motion to dismiss at the conclusion of the plaintiff's case, casts further doubt on the Union's position. When such a motion is presented, it is the trial court's duty to determine whether, assuming all of the plaintiff's evidence to be true, it has made out a *prima facie* case. In other words, both the motion to dismiss and the ruling thereon assume the credibility of the plaintiff's witnesses.[20] Even if the Trial Examiner's explanation on the record were ambiguous (and we submit it is not), it should be presumed that he followed the prevailing rule.

Moreover, contrary to petitioners' suggestion (Co. br. p. 8, Un. br. pp. 18–19), nothing in the Board's Order of Remand "directed" or "compelled" the Trial Examiner either to reverse his earlier decision or to credit Wargny's testimony. The issues presented to the Board, when the General Counsel filed exceptions to the Trial Examiner's dismissal of the complaint as to the Union, were similar to those presented to an

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[20] *Smith* v. *Russell*, 76 F. 2d 91, 93 (C.A. 8), certiorari denied, 296 U.S. 614; *Durham* v. *Warner Elevator Mfg. Co.*, 139 N.E. 2d 10, 14, 166 Oh. St. 31; *Hering* v. *Hilton*, 147 N.E. 2d 311, 314, 12 Ill. 2d 559; *Kingston* v. *McGrath*, 232 F. 2d 495, 497 (C.A. 9); *Churchill* v. *Southern Pacific Co.*, 215 F. 2d 657, 658 (C.A. 9); *Schad* v. *20th Century Fox Film Corp.*, 136 F. 2d 991, 992–994 (C.A. 3); *Merkel* v. *Carter Carburetor Corp.*, 175 F. 2d 323, 325 (C.A. 8); *Bell* v. *Bayly Bros. Inc., of California*, 127 P. 2d 662, 664, 53 Cal. App. 2d 149; *Davis* v. *Curry*, 133 P. 2d 186, 188, 192 Okla. 2.

appellate court when it considers the propriety of a trial court's action in dismissing a complaint at the conclusion of the plaintiff's case. Under such circumstances, the only issue before the appellate court is whether the plaintiff made out a *prima facie* case, and in resolving this question the appellate court does not determine credibility issues.[21] Similarly, in issuing the Order of Remand the Board did not, and perhaps could not, make any final determination as to Wargny's credibility. The Trial Examiner was wholly free to discredit Wargny's testimony in his Supplemental Intermediate Report. Instead, however, he "carefully read" the record, "reread and rechecked" parts of it "several times," and specifically credited Wargny's testimony (R. 58, 59). Accordingly, all the credibility findings herein are entitled to their usual weight (see *N.L.R.B.* v. *Stanislaus Implement Co.,* 226 F. 2d 377, 381 (C.A. 9) and cases cited therein).

II. The Board's order is proper

A. The Board did not abuse its discretion by issuing a broad cease-and-desist order against petitioners

As the Court of Appeals for the Third Circuit stated in *N.L.R.B.* v. *United Mine Workers of America, District 2,* 202 F. 2d 177, 179:

> It is settled that the Board has broad power to determine the necessary scope of its orders and that it is authorized to restrain other viola-

[21] *Schad* v. *20th Century Fox Film Corp.*, 136 F. 2d 991, 992–994 (C.A. 3); *Brewer* v. *Hearne Motor Freight Lines*, 297 P. 2d 1108, 1111, 179 Kan. 732; *Kingston* v. *McGrath*, 232 F. 2d 495, 497 (C.A. 9); *Churchill* v. *Southern Pacific Co.*, 215 F. 2d 657, 658 (C.A. 9); *Schnoor* v. *Meinecke*, 40 N.W. 2d 803, 808, 77 N.D. 96.

> tions of the act, the danger of whose commission in the future is to be anticipated from the course of the respondent's conduct in the past. *N.L.R.B.* v. *Express Pub. Co.,* 1941, 312 U.S. 426 * * *; *May Dept. Stores Co.* v. *N.L.R.B.,* 1945, 326 U.S. 376 * * *; *N.L.R.B.* v. *United Mine Workers,* 6 Cir. 1952, 195 F. 2d 961. * * * It is sufficient if it appears from the nature and extent of the respondents' past conduct that there is real danger that they will commit other unfair labor practices in the future.

Accord: *N.L.R.B.* v. *Sun Tent-Luebbert Co.,* 151 F. 2d 483, 488–489 (C.A. 9). In the case at bar, the Board noted that petitioners' unfair labor practices "demonstrate * * * such a fundamental antipathy to the objectives of the Act as to compel an inference that the commission of other unfair labor practices may be anticipated in the future" (R. 84). Accordingly, the Board required the Union to refrain from coercing the employees of any employer, and both the Company and the Union to refrain from in any manner coercing employees, in the exercise of their statutory rights. Such an order was well within the "broad power" which the statute vests in the Board.

Discrimination against employees for protected activity "goes to the very heart of the Act," *N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532, 536 (C.A. 4). This was emphasized by Congress when it enacted the 1959 amendments to the Act. These amendments added to the Act, *inter alia,* a provision which requires the Board's Regional Offices to give priority to such

cases.[22] However, as the Board pointed out (R. 84–85), "By conditioning employment on membership in, and clearance by, the Union, the [Company and the Union] have resorted to the most effective means at their disposal to defeat what the Supreme Court has termed the 'principal purpose of the Act,' namely, its guarantee to employees of 'full freedom of association and self-organization.' *Wallace Corp.* v. *N.L.R.B.,* 323 U.S. 248." Thus, for at least 6 months the Company and the Union were parties to an illegal arrangement under which no laborer who applied for work at the Company's Anchorage office for the White Alice project could obtain a job unless he was a union member and had a union dispatch slip. In fact, this arrangement was probably in effect for a considerably longer period, for Personnel Manager Wargny's assistant, who also required all job applicants to obtain union dispatch slips, testified that Wargny's predecessor "train[ed] [him] in the company policy" (R. 222–223, 233).

There can be no doubt that the Union had a policy of seeking to obtain from all employers closed-shop arrangements like the one in the instant case, for the Union required its members to do "all in [their] power to procure employment for [members] in pref-

[22] See P.L. 86–257, 73 Stat. 519, 29 U.S.C., Sec. 161(m). The provision in question states:

"SECTION 10(m). Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of Section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1)."

erence to any and all nonunion men" (R. 400, 176). The fact that the Union's unfair labor practices in the instant case constituted "an attempt to implement a settled policy previously announced" rendered eminently proper the framing of the order so as to prevent the Union from in any manner restraining or coercing employees, including employees of employers other than the Company. See *N.L.R.B.* v. *Springfield Building and Construction Trades Council,* 262 F. 2d 494, 498–499 (C.A. 1).[23]

Moreover, the unfair labor practices in the instant case were called for by the Company policy as well. Thus, the evidence in the record strongly suggests that the Company followed a similar practice with respect to hiring for other Alaska projects. The Company's manager for the Alaska district testified that the district had hired 3,000 men with dispatch slips, that the Company "depended upon" the appropriate unions to supply workers, and that a dispatch slip was "an indication that this is the man that the union sent to us, [otherwise] we would have fourteen guys on our porch every morning saying they had been sent by the union and they are the ones we are supposed to take" (R. 326, 355–356); he further assumed that all men supplied by the Union were union members (R. 352). Personnel Manager Warg-

[23] The Union failed specifically to except to the Trial Examiner's recommendation (R. 63) that it cease and desist from engaging in unfair labor practices with respect to employees of other employers. Accordingly, it may not challenge this aspect of the order before this Court. *N.L.R.B.* v. *International Association of Machinists, Lodge 942, AFL–CIO,* 263 F. 2d 796, 798–799 (C.A. 9), and cases cited therein.

ny testified that the Company's Anchorage personnel office required union membership and clearance from all employees hired through its office (see pp. 3–5, *supra*). District Office Manager Haugen testified that he required all applicants for jobs at the Anchorage office to obtain union clearance unless they were former employees specifically requested by a foreman, and all such former employees were union members (R. 392–394). Correspondence in the record shows that during this period the Company required union membership and clearance as a condition of hire from two heavy-duty mechanics within the jurisdiction of the Operating Engineers (R. 395–397, 165–168).

Furthermore, the Company has committed similar unfair labor practices both within and outside the Alaska area. Thus, in *Morrison-Knudsen Co., Inc.*, 123 NLRB No. 12, now on review in the Court of Appeals for the Second Circuit, two joint ventures of which the Company was the sponsor and managing agent participated in an arrangement with an Operating Engineers' local in Massena, New York, under which union clearance was a condition of hire, the union gave preference to its members and to members of sister locals, and nonmembers had to pay permit fees as a condition of obtaining referral. Similarly, in *Morrison-Knudsen Company, Inc.*, 101 NLRB 123, the Company, as manager of a joint venture, discharged an employee in Anchorage, Alaska, because he was not a member of a Plasterers' local. Moreover, in *Morrison-Knudsen, Inc.* v. *N.L.R.B.*, 44 LRRM 2680 (C.A. 9, No. 16301, August 10, 1959), this Court found that the Company violated the Act

by refusing to hire a warehouse clerk for a job near Fresno, California, because he was unable to obtain clearance from a Teamsters' local. The Court there denied enforcement of the Board's broad order on the ground that there was no evidence that the Company had in the past been guilty of any other unfair labor practices, but plainly the circumstances summarized above make this reasoning inapplicable in the case at bar.

Petitioners resist the order largely on the ground that compliance therewith would allegedly jeopardize the speedy construction of defense facilities. However, this Court has held that the Board is particularly justified in entertaining a complaint which alleges an unlawful hiring arrangement, where the employer's activities are vital to the national defense. *N.L.R.B.* v. *Thomas Rigging Co.,* 211 F. 2d 153, 155–156 (C.A. 9), employer's petition for certiorari denied, 348 U.S. 871. Congress took the same view when it enacted the 1959 amendments to the Act.[24] It goes without saying that nothing in the Board's order prohibits lawful hiring arrangements or the lawful operation of hiring halls.

[24] P.L. 86–257, 73 Stat., 519, 29 U.S.C., Sec. 165(c). Section 701 of these amendments adds to Section 14 of the Act a new subsection—subsection (c)—which provides that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." As of that date, the Board asserted jurisdiction over all enterprises over which it had statutory jurisdiction and whose operations exerted a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfied any of the Board's other jurisdictional standards. *Ready Mixed Concrete & Materials, Inc.,* 122 NLRB No. 43.

In sum, therefore, the Company's and the Union's serious and prolonged violations of the Act were dictated by their standing policy of seeking to enforce closed-shop conditions; and the Company's unfair labor practices have extended over a number of states, with respect to a number of different unions, and for a prolonged period. These circumstances show that "danger of [the] commission [of unfair labor practices] in the future is to be anticipated from the course of [petitioners'] conduct in the past" (*N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 437). Under settled authority, therefore, the Board properly exercised its discretion by requiring petitioners to refrain from in any manner coercing employees in the exercise of their statutory rights.

B. The Board did not abuse its discretion by requiring the Company and the Union to reimburse the employees for initiation fees, dues, and other monies paid by them as the price of their employment

Petitioners appear to concede that a reimbursement remedy may be proper in some circumstances. But, they say, reimbursement should not be required in this case because the project is important to national defense. Admittedly, as they point out, it is not easy to secure large numbers of skilled employees in Alaska and cooperation between the Company and the Union is essential. But, the Union seems to imply, such cooperation would be "scotch[ed]" if the same remedy is applied to it "which might serve the purposes of the Act under different circumstances" (Br. pp. 32–33). And in the same vein, the Company asserts that where it is virtually necessary for an employer to use the Union as its source of employees "the risk

of events occurring which are in violation of the Act also increases" (Br. p. 29). In short, petitioners apparently are asserting that the Board should not order the same remedy in cases in which the employer and union who have violated the Act are engaged in defense work that it does when non-defense work is involved. The lack of merit in such a contention is self-evident. Cf. *N.L.R.B.* v. *Thomas Rigging Co.*, 211 F. 2d 153, 155–156 (C.A. 9), employer's petition for certiorari denied, 348 U.S. 871, and the recent amendments to the Act, cited *supra*, p. 31.

Much of petitioners' attack upon the propriety of the reimbursement order is but a restatement of their contention that the record does not support the Board's finding that they were parties to an arrangement which made union membership, or application for membership, a condition of employment. Implicit in this argument is, of course, a recognition that the order is proper if the Board's findings with respect to the arrangement are supported by substantial evidence.

The coercive effect upon employees of such an illegal hiring arrangement is patent. It is difficult to imagine a more potent means of inducing employees into joining or remaining members of a union than to make membership a necessary element in obtaining and retaining employment. This is amply demonstrated in this case, for both Employee Abolins and Employee Crowe testified that they paid dues for the winter months because they wanted to be able to work for the Company during the following summer without having to pay a second initiation fee

(R. 195, 208).[25] In fact, the record shows that the Union's threats of discharge, pursuant to its unlawful hiring arrangement with the Company, impelled the employees to pay their initiation fees, and their dues for months in advance, shortly after being hired and earlier than was convenient for them (R. 183–184, 195, 217–218).[26] However, the Act (with an exception not here applicable) guarantees employees the right to refrain from union membership—and from paying initiation fees, dues, and other monies to a union—without jeopardizing their jobs. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40–42. Accordingly, the Board properly required the Company and the Union to refund this money.

The propriety of this order is squarely supported by the applicable precedents. The Courts of Appeals have uniformly approved such orders where, as here, an illegal union-security arrangement has compelled employees to pay fees and dues as the price of their jobs. *Dixie Bedding Manufacturing Company* v. *N.L.R.B.*, 268 F. 2d 901, 907 (C.A. 5); *Local Lodge*

[25] Under the statutory provisions in effect at that time, even if the petitioners' contract had contained a union-security clause, the employees could not have been required to join the Union until they had worked for the Company for 30 days, and could not have been discharged for failure to pay dues in advance. *N.L.R.B.* v. *Associated Machines, Inc.*, 239 F. 2d 858 (C.A. 6); *N.L.R.B.* v. *Allied Independent Union, CUA*, 238 F. 2d 120, 121–123 (C.A. 7).

[26] This testimony alone refutes the Union's claim that the order can stand only if it can be shown that none of the employees joined the Union before the illegal arrangement was entered into (Br. p. 33).

No. 1424, International Association of Machinists v. *N.L.R.B.*, 264 F. 2d 575, 582 (C.A.D.C.), certiorari granted, June 22, 1959; *N.L.R.B.* v. *Local 404, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL,* 205 F. 2d 99, 103–104 (C.A. 1); see also *N.L.R.B.* v. *Broderick Wood Products Company,* 261 F. 2d 548, 558–559 (C.A. 10); *N.L.R.B.* v. *General Drivers, Chauffeurs and Helpers Local Union No 886,* 264 F. 2d 21, 23 (C.A. 10).

The rationale underlying such orders is but an extension of the principles set forth in *Virginia Electric and Power Company* v. *N.L.R.B.*, 319 U.S. 533. In the *Virginia Electric* case the Supreme Court approved a Board order which required an employer to refund to its employees the dues which the employer had checked off from their wages pursuant to a closed-shop contract with a company-dominated union. 319 U.S. at 541–544. As the Supreme Court pointed out, such an order "aids in * * * restoring to the employees that truly unfettered freedom of choice which the Act demands," and restores to the employees "that which would not have been taken from them if the Company had not contravened the Act."[27] Similarly here, the reimbursement order will permit the Company's employees to determine for themselves whether or not they wish to join the Union and pay dues and other monies to it, without having to take petitioners' prior unfair labor practices into account, and will re-

[27] In *Virginia Electric* the Supreme Court in effect overruled *Western Union Telegraph Co.* v. *N.L.R.B.*, 113 F. 2d 992 (C.A. 2), relied on by the Company, pp. 26–27 of its brief. See 319 U.S. at 534, fn. 1.

store to them the payments they made in order to get and keep their jobs.

Nor is it essential to show, as a basis for the reimbursement order, that all of the employees paid their dues and fees involuntarily. *Dixie Bedding, supra; General Drivers, supra;* see also *Local Lodge 1424, supra.* While some of the Company's employees may have made such payments voluntarily, the burden would rest upon petitioners as "the tortfeasor[s] to disentangle the consequences" of the closed-shop arrangement, by showing that, even in its absence, dues and fees would nevertheless have been paid; and this they cannot do. *N.L.R.B.* v. *Swinerton, etc.*, 202 F. 2d 511, 515–516 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U.S. 576; see also *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation,* 236 F. 2d 898, 907 (C.A. 6), modified in respects immaterial here, 356 U.S. 342. Thus, evidence that employees may have joined the Union before petitioners entered into their illegal arrangement is immaterial, for the statute prohibits discrimination which encourages employees to *remain* members as well as discrimination which encourages them to become members. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 38, 39–42, 550. The Supreme Court has declared that where the "inherent effect" of union or employer conduct is coercive, not even the subjective evidence of employees to the contrary will avail the wrongdoer.

Radio Officers' Union v. *N.L.R.B.*, 347 U.S. 17, 29, 48–52; *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 228–231. Accord: *General Drivers, supra.* Nor does it matter that the employees may have received some value for their initiation fees and dues in the form of union services and benefits. *Virginia Electric,* 319 U.S. at 543–544; *General Drivers, supra.* The statute gives employees the right to decide for themselves whether or not to "buy" the benefits of unionism.

But petitioners contend that the reimbursement order is invalid because it is allegedly penal.[28] The Company concedes, however, that a Board order "may be designed to make whole someone who has in fact been deprived of recognized rights, or it may be designed to prevent a violator from benefiting from his misdeeds" (Co. br. p. 27). The order here, we submit, meets both of these tests. The employees are made whole for the payments unlawfully extracted from them as the price of their jobs, and the Union which received these payments is liable, jointly and severally, for their return. Moreover, while the Company did not itself receive the dues and fees, it received substantial pecuniary benefits by shifting to the Union the burden of finding most of its skilled workers (see Co. br. p. 23). The undisputed evidence shows that when a job superintendent on the White Alice project requested the Anchorage office to locate employees, the

[28] Contrary to the Company's suggestion (Co. br. p. 34), liability under the order will cease to accrue when the parties have corrected their unlawful hiring arrangement.

Company always called the Union for laborers unless he had requested particular individuals by name, and frequently even then (pp. 3–6, *supra*).[29] As both petitioners in effect admit (Co. br. pp. 17–18, Un. br. pp. 47–48), the Union's hiring office virtually functioned as the Company's hiring office. Accordingly, the dues and fees which the Company must in part repay were used to pay the Union for operating a hiring office which the Company unlawfully used instead of setting up and financing its own.

Petitioners' contention that the order is nonetheless punitive appears to rest primarily on the ground that they may have to repay a substantial amount of money. The order is intended to remove the effects of the unfair labor practices, and is remedial in nature, and it is not our understanding that the order becomes a penalty merely because the total amount may be large or because the repayment may present problems to the Company and the Union. Indeed, it is our belief that the point was settled in *Virginia Electric,* where the court said (319 U.S. at 544), "The fact that the Board may only have approximated its efforts to make the employees whole * * * does not convert this reimbursement order into the imposition of a penalty." Nor is there any proper basis for inferring, as the Union does from general remarks made by the then General Counsel of the Board (Fenton) and Board Member Fanning, that the Board has treated the reimbursement order as anything but

[29] Similarly, the Company did not even have a personnel manager for its 15-million dollar lump-sum contracts (R. 127–129).

a remedial device. The occasion for the General Counsel's remarks was in connection with an Agency "moratorium" policy on application of such a remedy, which was in effect throughout the greater part of 1958. In the course of these remarks, both the General Counsel and Member Fanning underlined the remedial characteristics of the reimbursement order.

In short, the reimbursement order is similar to other orders which have been uniformly approved by the Courts of Appeals, rests upon principles which have been approved by the Supreme Court, and has the practical effect of requiring petitioners to restore to the employees payments which petitioners have coerced from them and used for their own benefit. The order is well "adapted to the situation which calls for redress" (*N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348) and is therefore entitled to this Court's approval.[30]

[30] The Board issued its reimbursement order in accordance with the General Counsel's exceptions to the Supplemental Intermediate Report, in which the Trial Examiner found that the Company and the Union were parties to an illegal hiring arrangement. Contrary to the Company's contention (Br. pp. 35–36), this order was not barred by the General Counsel's failure to raise the issue in his exceptions to the first Intermediate Report, in which (as we have noted *supra*) the Examiner recommended dismissal of the allegations relating to the agreement. The Board had power to issue the order even absent any exceptions by the General Counsel. *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 384 (C.A. 9), certiorari denied, 341 U.S. 909; *N.L.R.B.* v. *Oregon Worsted Co.*, 94 F. 2d 671, 672 (C.A. 9); *General Shoe Corporation*, 90 NLRB 1330, 1333, enforced, 192 F. 2d 504 (C.A. 6), certiorari denied, 343 U.S. 904; *Cathey Lumber Co.*, 86 NLBR 157, 158, n. 2, enforced, 185 F. 2d 1021 (C.A. 5), decree set aside on grounds immaterial here, 189 F. 2d 428 (C.A. 5); *The Item Company*, 108 NLRB 1634, 1635, enforced, 220 F. 2d 956 (C.A. 5), certiorari denied, 352 U.S. 917; cf. *N.L.R.B.* v. *Richards*, 265 F. 2d 855, 862 (C.A. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions to review the Board's orders should be denied, and that a decree should issue enforcing the Board's orders in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8

(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom

membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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